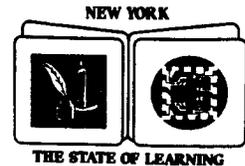


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OFFICE OF PROFESSIONAL
MEDICAL CONDUCT



THE STATE EDUCATION DEPARTMENT / THE UNIVERSITY OF THE STATE OF NEW YORK / ALBANY, N.Y. 12234

OFFICE OF PROFESSIONAL DISCIPLINE
ONE PARK AVENUE, NEW YORK, NEW YORK 10016-5802

February 16, 1990

Mario J. Merlino, Physician
300 Sharon Avenue
Staten Island, N.Y. 10301-3419

Re: License No. 121652

Dear Dr. Merlino:

Enclosed please find Commissioner's Order No. 10236. This Order and any penalty contained therein goes into effect five (5) days after the date of this letter.

If the penalty imposed by the Order is a surrender, revocation or suspension of your license, you must deliver your license and registration to this Department within ten (10) days after the date of this letter. In such a case your penalty goes into effect five (5) days after the date of this letter even if you fail to meet the time requirement of delivering your license and registration to this Department.

Very truly yours,

DANIEL J. KELLEHER
Director of Investigations

By:

A handwritten signature in black ink that reads "Moira A. Doran".

MOIRA A. DORAN
Supervisor

DJK/MAH/er
Enclosures

CERTIFIED MAIL- RRR

cc:

REPORT OF THE
REGENTS REVIEW COMMITTEE

MARIO J. MERLINO

CALENDAR NO. 10236



The University of the State of New York

IN THE MATTER

of the

Disciplinary Proceeding

against

MARIO J. MERLINO

No. 10236

who is currently licensed to practice
as a physician in the State of New York.

REPORT OF THE REGENTS REVIEW COMMITTEE

MARIO J. MERLINO, hereinafter referred to as respondent, was licensed to practice as a physician in the State of New York by the New York State Education Department.

The instant disciplinary proceeding was properly commenced and on March 16 and 24, 1989 a hearing was held before a hearing committee of the State Board for Professional Medical Conduct. A copy of the statement of charges is annexed hereto, made a part hereof, and marked as Exhibit "A".

The hearing committee rendered a report of its findings, conclusions, and recommendation, a copy of which is annexed hereto, made a part hereof, and marked as Exhibit "B".

The hearing committee concluded that respondent was guilty of the specification charged and recommended that respondent receive

MARIO J. MERLINO (10236)

a Censure and Reprimand in satisfaction of the charges brought against him.

The Commissioner of Health recommended to the Board of Regents that the findings, conclusions, and recommendation of the hearing committee be accepted. A copy of the recommendation of the Commissioner of Health is annexed hereto, made a part hereof, and marked as Exhibit "C".

It is noted that while the patient's name was not used, the name of the patient's mother was identified as a witness in the hearing committee's report. Accordingly, that name was redacted.

On November 2, 1989 respondent did not appear before us in person and no attorney appeared before us on respondent's behalf. Diane Abeloff, Esq., presented oral argument on behalf of the Department of Health.

The recommendation of petitioner (Department of Health) as to the measure of discipline to be imposed, should respondent be found guilty, was a Censure and Reprimand.

We have considered the record as transferred by the Commissioner of Health in this matter.

We unanimously recommend the following to the Board of Regents:

1. The findings, conclusions, and recommendation of the hearing committee be accepted;
2. The Commissioner of Health's recommendation as to the

MARIO J. MERLINO (10236)

findings, conclusions, and recommendation of the hearing committee be accepted;

3. Respondent be found guilty, by a preponderance of the evidence, of the first specification of the charges as alleged in paragraph C thereunder; and
4. Respondent be Censured and Reprimanded upon the specification of the charges of which respondent was found guilty as aforesaid.

Respectfully submitted,

EMLYN I. GRIFFITH

JANE M. BOLIN

PATRICK J. PICARIELLO



Chairperson

Dated: December 14, 1989

STATE OF NEW YORK : DEPARTMENT OF HEALTH
STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT

-----X

IN THE MATTER : STATEMENT
OF : OF
MARIO MERLINO, M.D. : CHARGES

-----X

MARIO MERLINO, M.D., the Respondent, was authorized to practice medicine in New York State on September 16, 1974 by the issuance of license number 121652 by the New York State Education Department. The Respondent is currently registered with the New York State Education Department to practice medicine for the period January 1, 1989 through December 31, 1991 at 300 Sharon Avenue, Staten Island, New York.

Factual Allegations

- A. From on or about October 7, 1982 through on or about August 16, 1988, Respondent rendered care and treatment to Patient A (whose name appears in the attached appendix) at his office located at 300 Sharon Avenue, Staten Island, New York.
- B. On or about August 16, 1988, Patient A's mother brought Patient A to Respondent's office for his school physical.

- C. At the time, Patient A was approximately 5-1/2 years old. Patient A's mother accompanied Patient A into the examination room. During the course of the examination Respondent attempted to obtain blood from Patient A, which Patient A resisted. Respondent slapped Patient A's face at least twice during the examination.
- D. At or about 5:30 p.m., on or about August 16, 1988, approximately one hour after Respondent's examination of Patient A, Patient A's mother took her son to the Staten Island Hospital emergency room, 475 Seaview Avenue, S. I., N.Y., for an examination of his face.
- E. The emergency room physician at Staten Island Hospital found finger marks on Patient A's left cheek and also found the cheek to be swollen.

Specification of Charges

FIRST SPECIFICATION

Willful Physical Abuse of a Patient

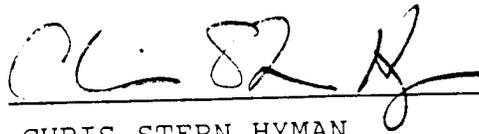
The Respondent is charged with committing unprofessional conduct under N.Y. Educ. Law Section 6509(9) (McKinney 1985), in that he committed unprofessional conduct within the meaning

of 8 N.Y.C.R.R. 29.2(a)(2), when he willfully physically abused Patient A in that, the Petitioner charges:

1. The facts in Paragraph C.

DATED: New York, N.Y.

January 24, 1989



CHRIS STERN HYMAN
Counsel
Bureau of Professional Medical
Conduct

STATE OF NEW YORK : DEPARTMENT OF HEALTH
STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT
-----X

IN THE MATTER : REPORT OF
OF : THE HEARING
MARIO MERLINO, M.D. : COMMITTEE
-----X

TO: The Honorable David Axelrod, M.D.
Commissioner of Health, State of New York

KENNETH KOWALD (Chair), PHILLIP I. LEVITAN, M.D., and WINSTON S. PRICE, M.D., duly designated members of the State Board of Professional Medical Conduct, appointed by the Commissioner of Health of the State of New York pursuant to Section 230(1) of the Public Health Law, served as the Hearing Committee in this matter pursuant to Section 230(10)(e) of the Public Health Law. LARRY G. STORCH, ESQ., served as Administrative Officer for the Hearing Committee.

After consideration of the entire record, the Hearing Committee submits this report.

SUMMARY OF PROCEEDINGS

Service of Notice of Hearing and Statement of Charges against Respondent:	February 21, 1989
Answer to Statement of Charges:	None
Pre-Hearing Conference:	None

Dates and Places of Hearings: March 16, 1989
8 East 40th Street
New York, NY 10016

March 24, 1989
8 East 40th Street
New York, NY 10016

Adjournments: None

Final Deliberations: March 24, 1989

Department of Health appeared by: Dianne Abeloff, Esq.
Associate Counsel

Respondent appeared by: Paul Scano, Esq.
1010 Forest Avenue
Staten Island, New York 103

Hearing Committee absences: None

Witnesses for Department of Health: 
Diane Killip, M.D.

Witnesses for Respondent: Valerie Catanzaro
Abina Claps, M.D.
Sandra Edkins
Mario Merlino, M.D.

STATEMENT OF CASE

The Department's charges allege, in substance, that Respondent Mario Merlino, M.D., a pediatrician, slapped the face of a 5 1/2 year old patient while attempting to obtain blood from the patient during the course of a routine physical examination. The patient was resisting the blood test. Based upon the facts alleged, the Department has charged Respondent with committing unprofessional conduct in that he willfully physically abused the patient. Respondent has conceded the facts as alleged by the Department, but contends that his conduct did not constitute willful physical abuse within the meaning of the law.

FINDINGS OF FACT

1. Respondent was authorized to practice medicine in New York State on September 16, 1974 by the issuance of license number 121652 by the New York State Education Department. He is currently registered to practice medicine for the period January 1, 1989 through December 31, 1991 at 300 Sharon Avenue, Staten Island, New York. (Petitioner's Exhibit No. 2).

2. From October 7, 1982 through August 16, 1988, Respondent rendered medical care and treatment to Patient A. (Tr., p. 356; Petitioner's Exhibit No. 3).

3. On August 16, 1988, Patient A's mother brought Patient A to Respondent for a school physical examination. At the time, Patient A was approximately 5 1/2 years old. (Tr., pp. 16; 358).

4. Patient A's mother was with the patient during the examination. (Tr., pp. 17; 359).

5. The examination consisted of a recording of Patient A's height, weight and temperature, as well as an examination of the patient's head, ears, throat, glands, heart, lungs, stomach and genitals. (Tr., pp. 360-361).

6. Respondent performs annual tine tests on his patients. He administered a tine test to Patient A during the examination conducted on August 16, 1988. (Tr. pp. 360-361).

7. Following the administration of the test, Respondent left the examination room and recorded his findings in the patient's chart. (Tr. p. 361).

8. Upon his review of Patient A's chart, Respondent noted that there was no indication of a hemoglobin level. He informed Patient's mother that he wanted to check the patient's hemoglobin level, and summoned his assistant, Valerie Catanzaro, to obtain the necessary blood sample. (Tr., pp. 138; 365).

9. Ms. Catanzaro attempted to obtain the blood by using an autolancet to prick Patient A's finger, but he resisted the procedure by jumping upon the examination table and screaming. (Tr., pp. 139; 145).

10. After several unsuccessful attempts, over approximately a five minute period, Ms. Catanzaro summoned Respondent back to the examination room. (Tr., pp. 146; 366).

11. Respondent attempted to restrain the patient and unclench his fingers, while the child continued to struggle. (Tr., pp. 366-367).

12. Respondent then instructed Ms. Catanzaro to grab Patient A's hand. Respondent then held the patient's head and slapped the patient's left cheek with a sharp slap. (Tr., p. 373; Respondent's Exhibit B).

13. When the patient continued to struggle, Respondent slapped the patient's cheek a second time. (Respondent's Exhibit B).

14. Respondent testified that the slaps were administered in an attempt to distract Patient A so that Ms. Catanzaro could obtain the blood sample. (Tr. p. 373).

15. Respondent called in his other assistant, Sandra Edkins, to assist in restraining the patient. (Tr., pp. 307; 377).

16. Ms. Edkins held Patient A's head, while Respondent restrained his legs and arm. In less than a minute, Ms. Catanzaro was able to obtain the blood sample. (Tr., pp. 307; 378).

17. Shortly thereafter, Patient A's mother paid the bill, and she and Patient A left Respondent's office. (Tr., p. 22).

18. At approximately 5:30 p.m. on August 16, 1988, Patient A's mother brought the patient to the emergency room at the Staten Island Hospital, 475 Seaview Avenue, Staten Island, New York. (Petitioner's Exhibit 3).

19. The emergency room physician on duty noted mild swelling and fingermarks on the patient's left cheek. (Petitioner's Exhibit 3).

20. Respondent admitted that it is not accepted pediatric practice to slap a child on the face. (Tr. pp. 391-392).

21. Respondent further testified that the appropriate accepted medical practice is to have two people restrain the patient. (Tr. p. 396).

CONCLUSIONS OF LAW

The following conclusions were made pursuant to the findings of fact herein. All conclusions resulted from a unanimous vote of the Hearing Committee unless noted otherwise.

FIRST SPECIFICATION

Committing unprofessional conduct by willful physical abuse of a patient.

Respondent is charged with a violation of Section 6509(a) of the Education Law, which defines professional misconduct as, inter alia, committing unprofessional conduct as defined in regulations promulgated by the Commissioner of the Education Department and approved by the Board of Regents. 8 NYCRR 29.2(a) defines unprofessional conduct, in pertinent part, as "willfully harassing, abusing or intimidating a patient either physically or verbally...." Neither the statute, nor the regulations define the terms "willful" and "abuse." Therefore, the Hearing Committee looked to other sources for guidance.

The Committee consulted Black's Law Dictionary (5th Ed.). Black's (at page 1434) defines "willful," in pertinent part, as:

....Proceeding from a conscious motion of the will; voluntary. Intending the result which actually comes to pass; designed; intentional; not accidental or involuntary... A willful act may be described as one done intentionally, knowingly, and purposely, without justifiable excuse, as distinguished from an act done carelessly, thoughtlessly, heedlessly or inadvertently....

Black's Law Dictionary also defines the term "abuse,"
at page 10:

....Everything which is contrary to good
order established by usage. Departure from
reasonable use; immoderate or improper use.
Physical or mental maltreatment....

Utilizing these definitions as a framework for its
deliberations, the Hearing Committee concluded that, by a
preponderance of the evidence, the charge should be sustained.
The rationale for this conclusion is set forth below.

Respondent admitted that he slapped Patient A's face.
He further admitted that this was a conscious, intentional act on
his part. His purpose in striking the child was to distract him
long enough to obtain a blood sample. It was not done out of anger
or frustration, but as a means of completing a diagnostic
procedure. Thus, it is clear that Respondent's conduct was
willful.

Further, it was the unanimous opinion of the physicians
who testified during these proceedings (Drs. Killip, Claps and
Respondent), that striking a child as a means of distraction did
not constitute generally accepted medical practice. Therefore,
the Hearing Committee also concluded that Respondent's conduct
constituted physical abuse. As a result, the Committee concluded
that the First Specification set forth in the Statement of Charges
should be SUSTAINED.

RECOMMENDATIONS

The Hearing Committee, pursuant to its Findings of Fact and Conclusions herein recommends that Respondent receive a censure and reprimand in satisfaction of the charges brought against him. This recommendation was reached after due consideration of the full spectrum of available penalties, including suspension, revocation or the imposition of a civil penalty of up to \$10,000.00.

It was the opinion of the Hearing Committee that neither suspension nor revocation of Respondent's medical license would be appropriate, under the circumstances. The Department did not allege or submit proof indicating any deficiencies in Respondent's medical knowledge or competence. Further, only a single instance of misconduct was charged. Therefore, it would not be appropriate to prohibit Respondent from practicing medicine. The Committee also considered imposition of a term of community service. However, the record demonstrated that Respondent already devotes significant amounts of time to community activities. Therefore, it was the opinion of the Hearing Committee that mandatory community service would be redundant. The Committee also believed that a monetary penalty was not appropriate to the circumstances.

Nevertheless, the Committee does not condone Respondent's conduct in this matter, and believes some sanction is required to make it clear that such conduct by a physician will not be tolerated. Hence, the Hearing Committee recommends that Respondent, Mario Merlino, M.D., receive a censure and reprimand in satisfaction of the charges brought against him.

DATED: Albany, New York
 July 27, 1989

Respectfully submitted,



KENNETH KOWALD (Chair)
Phillip I. Levitan, M.D.
Winston S. Price, M.D.

STATE OF NEW YORK : DEPARTMENT OF HEALTH
STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT
-----X

IN THE MATTER :

OF :

MARIO MERLINO, M.D. :
-----X

COMMISSIONER'S
RECOMMENDATION

TO: Board of Regents
New York State Education Department
State Education Building
Albany, New York

A hearing in the above-entitled proceeding was held on March 16 and 24, 1989. Respondent Mario Merlino, M.D., appeared by Paul Scano, Esq., of Counsel. Petitioner appeared by Peter J. Millock, Esq., General Counsel, Dianne Abeloff, Esq., of Counsel.

NOW, on reading and filing the transcript of the hearing and exhibits and other evidence, and the findings, conclusions and recommendation of the Committee,

I hereby make the following recommendation to the Board of Regents:

1. The Findings of Fact and Conclusions of the Committee should be accepted in full;
2. The Recommendation of the Committee should be accepted in full; and
3. The Board of Regents should issue an order adopting and incorporating the Findings of Fact and Conclusions and further adopting as its determination the Recommendation described above.

The entire record of the within proceeding is transmitted with this Recommendation.

DATED: ALBANY, NEW YORK

September 8, 1989



DAVID AXELROD, M.D.
Commissioner of Health
State of New York

**ORDER OF THE COMMISSIONER OF
EDUCATION OF THE STATE OF NEW YORK**

MARIO J. MERLINO

CALENDAR NO. 10236



The University of the State of New York

IN THE MATTER

OF

MARIO J. MERLINO
(Physician)

DUPLICATE
ORIGINAL
VOTE AND ORDER
NO. 10236

Upon the report of the Regents Review Committee, a copy of which is made a part hereof, the record herein, under Calendar No. 10236, and in accordance with the provisions of Title VIII of the Education Law, it was

VOTED (January 17, 1990): That, in the matter of MARIO J. MERLINO, respondent, the recommendation of the Regents Review Committee be accepted as follows:

1. The findings, conclusions, and recommendation of the hearing committee be accepted;
 2. The Commissioner of Health's recommendation as to the findings, conclusions, and recommendation of the hearing committee be accepted;
 3. Respondent is guilty, by a preponderance of the evidence, of the first specification of the charges as alleged in paragraph C thereunder; and
 4. Respondent be Censured and Reprimanded upon the specification of the charges of which respondent was found guilty as aforesaid;
- and that the Commissioner of Education be empowered to execute,

*Regent Gerald J. Lustig, M.D. abstained

MARIO J. MERLINO (10236)

for and on behalf of the Board of Regents, all orders necessary to carry out the terms of this vote;

and it is

ORDERED: That, pursuant to the above vote of the Board of Regents, said vote and the provisions thereof are hereby adopted and **SO ORDERED**, and it is further

ORDERED that this order shall take effect as of the date of the personal service of this order upon the respondent or five days after mailing by certified mail.

IN WITNESS WHEREOF, I, Thomas Sobol, Commissioner of Education of the State of New York, for and on behalf of the State Education Department and the Board of Regents, do hereunto set my hand and affix the seal of the State Education Department, at the City of Albany, this 29th day of

January, 1990.

Thomas Sobol

Commissioner of Education